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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

v.

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington, D.C. area, with some 100,000 members in all the States of the United States. Its sole chartered purpose is to preserve the principle of

separation of church and state as set forth in the First Amendment to the Constitution of the United States and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members in the State of Rhode Island and is especially concerned over any development in the state which raise questions of possible infringements of the Constitution of the State of Rhode Island but, more particularly, any possible violations of the religious clauses of the First Amendment to the Constitution of the United States.

This *amicus* brief takes the position that Chapter 246 of the Public Laws of the State of Rhode Island (1969) entitled "An Act providing salary supplements to non-public school teachers" is unconstitutional. This position is not motivated by any hostility to any particular church or to any particular religion. As the Maryland Court of Appeals said in the *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

Our task is to advise the court as objectively and fairly as possible as to the law applicable to a determination of the constitutionality of the "Salary Supplement" levy involved, with particular attention to the strictures of the First Amendment.

STATUTE INVOLVED

The statutory provision involved in this suit is a Rhode Island statute entitled "An Act Providing Salary Supple-

ments to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51 (referred to herein as the Salary Supplement Act).

QUESTIONS PRESENTED

Is Rhode Island's Salary Supplement Act, which provides state funds for the use of church schools in supplementing teachers' salaries, unconstitutional as violative of the Establishment Clause of the First Amendment, as applied to the State through the Fourteenth Amendment, because the Act: (1) uses church schools as instrumentalities or agents to carry out an alleged secular purpose or program of the state—namely, the education of church school students in secular subjects; (2) has a primary effect (among others) of advancing or inhibiting religion by channeling the resources of the state to church educational activities; and (3) results in a "reciprocal embroilment of government and religion which the First Amendment was meant to avoid"?

STATEMENT OF THE CASE

On May 16, 1969, the Governor of the State of Rhode Island approved an Act which became effective July 1, 1969, entitled, "An Act providing salary supplements to non-public school teachers . . ." (Chap. 246 of the Public Laws of the State of Rhode Island (1969)). The Act authorized payment by Rhode Island of a salary supplement to teachers in church schools in the amount of 15% of their salaries. This was to be carried out under regulations of the Rhode Island Commissioner of Education. Funds were appropriated out of the general treasury of the State of Rhode Island. As of December 10, 1969, approximately 200 teachers on the staff of church schools had applied to the Commissioner of Education for the salary supplement.

In December of 1969, six Rhode Island Taxpayers, two of whom had children in the public schools, initiated

a complaint in the United States District Court for the District of Rhode Island challenging the Rhode Island statute granting salary supplements to church schoolteachers. The defendants named were the state's Commissioner of Education, General Treasurer and Comptroller. Certain lay teachers in Catholic schools were allowed to intervene. The teachers had all applied for state salary supplements. On February 13, 1970, Judge Raymond J. Pettine issued a temporary order restraining the state officials from making the initial salary payments to the church schoolteachers. These payments would have amounted to close to $70,000 for some 156 teachers in 51 Catholic schools.

On June 15, 1970, a three-judge panel of the District Court of the United States for the District of Rhode Island held that the plaintiffs were entitled to a declaratory judgment that Rhode Island's Salary Supplement Act (R.I. Public Laws c. 246 (1969)) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

SUMMARY OF ARGUMENT

The District Court's ruling that the Salary Supplement Act contravenes the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the State of Rhode Island by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940)) is clearly correct. The recent decision in *Walz v. Tax Commission*, 397 U.S. 664 (1970), added a measuring device to other tests of constitutionality previously described in *Everson v. Board of Education*, 330 U.S. 1 (1947), *Abington School District v. Schempp*, 374 U.S. 203 (1963), and *McGowan v. Maryland*, 366 U.S. 410 (1961).

The new measure of constitutionality is whether the government involvement with church affairs or religion "is

excessive and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement" (*Walz*, p. 675).

If the facts of a particular case show that the administration of an Act requires continuing surveillance by and entanglement of the government with a church, such an Act is unconstitutional. The court below found such administrative involvement inherent in the Salary Supplement Act. It further found that a primary effect of the Act was to inhibit religion by significantly limiting the internal freedom of parochial schools (*DiCenso*, p. 121). The court stated:

> "In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970." (*DiCenso*, p. 122)

Amicus argues further that the Rhode Island Salary Supplement Act not only creates "an impermissible degree of entanglement" between the church and state (cf. *Walz*, supra) but blatantly uses church organizations as "agents" to help carry out a broad education program of the State of Rhode Island. Amicus contends that there is no constitutional power in the State of Rhode Island to use churches to carry out any of its responsibilities, educational or otherwise, where nonreligious means are reasonably available, *McGowan v. State of Maryland*, 366 U.S. 420 (1961). Not only is there no power, but the Establishment Clause of the First Amendment of the Constitution (now applicable to the states) has been interpreted to forbid such "agency" relationship with its inherent "involvement" or "entanglement" of church and state (cf. *Walz*, supra).

ARGUMENT

The case here before the court is but one of a series involving an interpretation of the meaning and applicability of that provision in the First Amendment which reads: "Congress shall make no law respecting an establishment of religion. . . ." This court used the Fourteenth Amendment to extend this prohibition to the state legislatures: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;– nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." (*Cantwell v. Connecticut*, supra). For a long period, few whose religious liberties or whose immunity from coerced support of churches or religion were inhibited by a state statute, had standing to seek redress of their grievances in a federal court (*Frothingham v. Mellon*, 262 U.S. 447 (1923)). Since the opinion in *Flast v. Cohen*, 392 U.S. 83 (1968), numerous such grievances have been brought to this court's attention.

Two additional cases await argument in this court, *Tilton v. Richardson* (No. 153, October Term 1970) and *Lemon v. Kurtzman* (No. 89, October Term 1970); both involve the general principles which will govern this case. There are several other important cases on the way which will be similarly affected by whatever clarification the court can give to the meaning of the First Amendment–*Rita Johnson v. William J. Sanders*, decided October 14, 1970 by a three-judge panel of the United States District Court (District of Connecticut), *Americans United v. Independent School District*, decided November 19, 1969, presently on appeal from the Supreme Court of Minnesota to this court (No. 934, October Term, 1970), and *Board of Education of the County of Kanawha v. Hughes* (No. 517, October Term 1970) on appeal from the Supreme Court of Appeals of West Virginia. Also pending, by the filing of a Jurisdictional Statement, is *Kervick v. Clayton* (No. 852, October Term 1970) on appeal from the Supreme Court of New Jersey.

Amicus supports the position that an unconstitutional invasion of the individual's right to be free of religious establishment is present in *Lemon, Tilton, Johnson, Americans United v. School District* and *Americans United v. United States,* but not in *Kervick.* As our youngsters learn in the new math—here the "universe" is a set of statutes involving some sort of favorable relation between the church and state (favorable from the point of view of the church) one set consists of those statutes which are permissible under the First Amendment and the other those which are impermissible.

Trailing behind these cases are others that are under consideration in the lower courts which may or may not be appealed to this court—for example, *Protestants and Other Americans United v. United States,* decided December 16, 1970 in the United States Court of Appeals for the Sixth Circuit (a copy of the Opinion is included in the Appendix hereto). All have to do with the First Amendment and religious liberty and any opinion in one case should be consistent with the holdings in the others. Since Amicus has been involved in one way or another in all these cases and more, it is difficult to advise this court in this case without reference to how an opinion will fit across the board. It would be convenient not to know anything about these other cases, but they do exist. They invite an interpretation of the First Amendment which will bring an over-all harmony to the constitutional law of church-state relations.

DiCenso here involves a statute under which the State of Rhode Island purports to use taxpayer funds to supplement the salaries of teachers of secular subjects in church schools. We do not raise any question as to whether the legislators were motivated by the possibility of sectarian church support for their re-election in return for this favor. Like the District Court, we are careful to distinguish between the "motive" behind the legislation and the "purpose" of the Act. This court generally avoids making enquiries into the motives behind any particular legislation. Such an inquiry, unless it be in connection with obviously ill-motivated legis-

lation, is beyond the resources of any court. In *McGowan v. Maryland*, 366 U.S. 420 (1961), Justice Frankfurter observed: "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing.

On the other hand, the "purpose" of legislation may be determined and, in the field of church-state relations, *must* be determined. Most statutes, including Rhode Island's Salary Supplement Act, have several purposes simultaneously. If one of the statutory purposes is to aid religion, or to assist churches in their activities, the First Amendment to the federal constitution prohibits such a purpose (*McGowan v. Maryland*, 366 U.S. 420 (1961)). The "effect" of a piece of legislation is even more important than its "purpose" for the "best laid plans of mice and men gang aft aglae." This is particularly true in modern government where the complexities are such that many legislative acts are not only counterproductive but even if constitutional in purpose end up unconstitutional in effect. That is doubly the case here—also in *Lemon* and in *Tilton*.

At all times it helps to keep in mind as well the "purpose and primary effect" of the religious clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (One of the results of the Civil War was that these clauses, which were originally only a restraint upon Congress, were extended to limit the power of state legislatures. *School District of Abington Township v. Schempp*, 374 U.S. 203, and cases cited therein; *Murdock v. Pennsylvania*, 319 U.S. 105, 108; *Everson v. Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum v. Board of Education*, 33 U.S. 203, 210-211; *Zorach v. Clauson*, 343 U.S. 306; *McGowan v. Maryland*, 366 U.S. 420; *Torcaso v. Watkins*, 367 U.S. 488; and *Engel v. Vitale*, 370 U.S. 421.) These two restrictive clauses create one of the most important of civil rights—namely, the "free exercise of religion" which may not now be invaded by either the State governments or by the Federal government to which the First Amendment

originally addressed itself. Justice Black in *Gideon v. Wainwright*, 372 U.S. 335 (1963), stated: "Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, *religion*, assembly, association, and petition for redress of grievances" (p. 341). In *McGowan v. State of Maryland*, 366 U.S. 420 (1961), Justice Frankfurter reminded in his separate opinion: "The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause" (p. 460).

In all three cases, *Lemon*, *Tilton*, and *DiCenso*, *amicus* takes the position that the religious clauses of the First Amendment prohibit the use of taxpayer funds to implement any plan or procedure whereby the church is to be used as an instrumentality or agency of the state to carry out any purpose, no matter how secular the purpose or effect of the statute or administrative regulation involved.

(a) In *DiCenso*, the Salary Supplement Act of the Rhode Island legislature uses taxpayer funds to pay part of the salaries of church schoolteachers and thus joins the state with the church to carry out an allegedly "secular" purpose of the State of Rhode Island. The church schools involved pay part and the state pays part of these teachers' salaries to carry out their respective "secular" purposes. By this merging of resources the State of Rhode Island attempts to use the facilities and teachers of the Roman Catholic school system (and others) to carry out a "secular" government program.

(b) In *Lemon*, the Nonpublic Elementary and Secondary Education Act of the Pennsylvania legislature uses state funds to contract for "secular educational services" from church schools—the same services which are already available from the state school system of the Commonwealth. Those who cherish religious education have persuaded the

state legislature to use church schools as an agency of the state to perform a secular educational function.

(c) In *Tilton*, the Higher Education Facilities Act of the United States uses taxpayer funds for the construction of buildings at undergraduate church colleges, again for use in the teaching of "secular" subjects.

All three statutes employ religion as an engine of civil policy decried by James Madison in his *Memorial and Remonstrance* where he pointed out: "We remonstrate against the said Bill, . . . because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; *The second an unhallowed perversion of the means of salvation*" (emphasis supplied). Who can be so blind as not to see that Rhode Island's "Salary Supplement Act" is an attempt to employ religion as an engine of civil policy and results in an unhallowed perversion of the means of salvation. Madison made the further point: "Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not." (Writings of James Madison (Hunt Ed.), Vol. II, pp. 183-191.)

One of the reasons why there is any legal question at all in this type of case is because of a misunderstanding of the Supreme Court's holding in *Board of Education v. Allen*, 392 U.S. 236 (1968), the dicta of which appears to condone the governmental financing of church schools, particularly the secular aspects of such education. The Supreme Court observed in *Allen*, supra, at 247-48:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about

> the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

Now it is true that church schools have undertaken the task of secular education, and some claim to be doing so almost to the exclusion of religion. If this invasion of the field of religion by the government is allowed to continue, the payment of church personnel by the government for secular activities may so divert churches from their religious functions as to completely destroy religion. This, of course, was one of the results of the mixture of church and state which Madison and most of the commentators have subsequently feared. This, too, the doctrine of separation of church and state was intended to prevent.

If we review the statute in the *Allen* case, we quickly see that the books were to be furnished to the students and not to the churches. While close to the line, this Court in *Allen* did not have a case where, without equivocation, the aid was to the church. Nor was the church school made an instrumentality to carry out a "secular" purpose of the government. If, as a matter of fact, the aid is to the student and not to the church school, and if the authority used to carry out the secular purpose of the government does not make the church school substantially an agent of the government (the *de minimis* doctrine makes this test practicable) there is no problem. And this is what we believe *Allen* was all about—and this is what happened in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the

parents were reimbursed not the school; the parents were the agents of the government; the bus lines and passengers were benefitted, not the churches; and, finally, a secular purpose of the government, the safe transportation of children, was accomplished.

In *Tilton*, the District Court applying the "purpose and primary effect" test associated with both *Everson* and *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), came up with an erroneous test for the constitutionality of a statute claimed to infringe the religious clauses of the First Amendment: "The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid" (*Allen*, p. 1198). Thus interpreted, the Establishment Clause would permit the government, state or federal, to assist church schools and to use church schools to carry out the educational responsibilities of the state, provided only that the particular courses taught were secular and not religiously oriented. Referring to the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964), which grants federal funds to church-related colleges for construction of academic facilities, the District Court in *Tilton* stated: "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions" (*Allen*, p. 1199).

It does not take any great cerebration to realize that a pandora's box of religious strife will be opened if this new erosion of the principle of separation of church and state is permitted to undermine the foundation of the First Amendment. Any conceivable secular activity or function of a present-day church could be subsidized at taxpayer expense if it is the nature of the function rather than the nature of the institution which is the test for avoidance of the principle of separation of church and state.

In effect, the rationale of *Tilton* and the other lower court opinions have changed the holdings in *Allen* into

a constitutional credit card for state and federal use of taxpayer funds to finance the secular activities of churches. But this distortion has been stopped cold by the Sixth Circuit Court of Appeals in *Protestants and Other Americans United v. United States*, decided December 16, 1970. The Circuit Court held:

> "The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen*.
>
> "In *Allen* the Supreme Court upheld a state statute which authorized the lending of secular text books to children irrespective of whether they attended public or private (parochial) schools. The Court applied the test stated in Abington School Dist. v. Schempp, 374 U.S. 203 (1963):
>
> > "'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' Id. at 222.
>
> "*Allen* followed *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.
>
> "In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks.
>
> "Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools

> for use by the children and the teachers. While the statute contains safeguards intended to insure the the purchase of secular books and materials only, there is still a question whether this constitutes forbidden involvements of the state with religion. It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance." (Slip opinion, p. 2.)
>
> ". . . In our opinion, the additional step in the present case, namely, the loaning of library books and materials directly to the parochial schools, rather than the issuing of textbooks directly to the school children, together with the issue of whether the involvement required in applying the safeguards of the Act is minimal and remote, present substantial questions which were not resolved in *Allen*, and which require the convening of a three-judge District Court for determination." (Slip opinion, p. 3.)

The Sixth Circuit Court has re-emphasized the clear language of Justice White who delivered the opinion of this court in *Allen:*

> "the law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically in the State. Thus no funds or books are furnished to parochial schools and the financial benefit is to the parent and children not to the schools." (392 U.S. 263 (1968).)

This clarification of *Allen* casts doubts on the propriety of using *Allen* and *Everson* as precedents to permit taxpayer funds to support the secular educational activities of churches. With this false path blocked off, this Court can serve one of the original purposes of the establishment clause, namely, prohibit any use of churches by the State to carry out the secular functions of the State where independent means would suffice.

This court now has an unique opportunity to sweep out the legal cobwebs which have been accumulating in the constitutional law of church-state relations. One of these cobwebs is the concept that it is the function and not the institution aided which determines constitutionality. This error should be spiked in its coffin like a latter-day Dracula. Otherwise, it will haunt the law of church and state for years to come. The misreading of *Everson* and *Allen* to permit state aid to churches—provided the function assisted is secular—has caused the churches to make a Herculean effort to squeeze themselves into the Procrustean bed of secularism to qualify for state aid. In *Murray v. Comptroller of the State of Maryland,* 216 A.2d 897 (1966), the Supreme Court of Maryland highlighted this secularization of the churches:

> ". . . today, religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services." (P. 407.)
>
> ". . . There is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. Real estate developers are donating sites to churches in their planned communities as part of the efforts to attract purchasers." (P. 908.)

If the devil has a sense of humor, he will laugh at those who labor to merge church and state so that the church is degraded to the status of a device to profit real estate promoters.

This court has a new opportunity to clarify the meaning of the religious clauses of the First Amendment and provide suitable tests to determine whether a particular statute involves a church-state constitutional question. The great language in *Everson*, supra, can be reiterated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (Emphasis supplied.)

This rule or test obviously covers a great many different situations where the government acts: (1) so as to set up a church; (2) aids one particular religion; (3) aids all religions or religions in general; (4) prefers one religion over another; (5) requires a person to go to church; (6) requires a person to stay away from church; (7) forces a person to profess a belief or disbelief in any religion; (8) punishes a person for entertaining or professing religious beliefs or disbeliefs; (9) punishes a person for church attendance or non-attendance; (10) uses tax funds to support religious activities; (11) uses tax funds to support religious institutions which practice or teach religion; (12) becomes involved or participates in the affairs of religious groups; (13) or permits churches to participate in state affairs, as "churches."

This court can formalize the rule devised by Justice Brennan, set forth in his concurring opinion in *Walz*, supra, which, as he states, gives "concrete meaning" to the Establishment Clause:

> ". . . the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understand- of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.* On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Caluse." (p. 680.) (Emphasis supplied.)

The "purpose and primary effect" test can also be made more useful while limiting that use to situations *where there is a question as to the meaning of a statute—not the meaning of the First Amendment.* This test was fashioned in *Everson, Zorach, McGowan* and *Schempp* and was reiterated in *Allen*:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

> power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education*, 374 U.S. at 222." (P. 243)

Finally, there is another test *which looks to the statute rather than to the meaning of the First Amendment.* This is the "involvement test" authored by Chief Justice Burger in *Walz.* This test was carefully and correctly used by the court below in testing the constitutionality of the Rhode Island Salary Supplement Act here under consideration. The court quotes the Chief Justice:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . (*Walz*, p. 675)

There must be a caveat in the use of this test. It is not applicable in every case. There will be many instances where there are direct grants of federal and state funds to churches or for the propagation of religion where there will be no involvement at all—no strings attached. The churches will be busy as beavers working with state legislatures removing all the safeguards on the use of tax funds for their educational and welfare activities—particularly those which require continuing surveillance to see how the funds are actually being used. This certainly was not the Chief Justice's intent.

Let us pause from these explanations and tests to concentrate on what the whole business is about—religious liberty, peaceful coexistence between church and state, sectarian cooperation, the avoidance of bloodshed and strife.

freedom of mankind to progress both materially and spiritually. Let us recall the threats to religious liberty which prompted Madison and Jefferson to insist on the inclusion of these safeguards in the constitution. So many Justices of this court have reviewed the dangers which prompted the adopted principle of the separation of church and state that it is difficult to pick just one. Justice Douglas recently put it neatly in *Engel v. Vitale*, 370 U.S. 421 (1962):

> "There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. . . . The great condition of religious liberty is that it be maintained free from sustenance as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting . . . . Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. . . . It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms . . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissentions."

The purpose of the religious clauses of the First Amendment has been to achieve the religious freedom which we all now enjoy in this nation; and let us rejoice, to continue the paraphrase of the test in Schempp, that the primary effect of this court's guardianship of the principle of separation of church and state has been the religious peace and absence of sectarian violence which we do not enjoy in other arenas of our social life today.

CONCLUSION

The Opinion and the Judgment of the court below should should be affirmed.

Respectfully submitted,

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
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APPENDIX

No. 20270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL., *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed December 16, 1970.

Before WEICK, EDWARDS and PECK, Circuit Judges.

WEICK, Circuit Judge. This appeal is from an order of the District Court granting summary judgment in favor of the defendants and dismissing the complaint, as amended.

The action in the District Court was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 36, 20 U.S.C. § 821-27, which authorizes federal grants for library and instructional materials for use of pupils and teachers in public and private (including parochial) schools.

Plaintiffs prayed that a three-judge court be convened, that an injunction be granted restraining enforcement of the Act, and sought a declaratory judgment that the statute is unconstitutional in violation of the Establishment Clause in the First Amendment to the Constitution of the United

States; and further prayed for the return of $14,606.02 to the United States by the Treasurer of the State of Ohio and the Superintendent of the Dayton School District, which sum was alleged to have been distributed to twenty-two parochial schools in the Dayton City School District for the purchase of books and materials; and further prayed for damages in the amount of $5,000.00.

In a prior appeal, in an unreported order, we held that the plaintiffs had standing to sue on the authority of *Flast v. Cohen*, 392 U.S. 83 (1968).

The District Court, in a memorandum opinion and order, declined to convene a three-judge court and granted summary judgment in favor of the defendants on the ground that the issues of the case were controlled by the decision of the Supreme Court in *Board of Educa. v. Allen*, 392 U.S. 236 (1968).

Where an injunction is sought to restrain the enforcement of a state or federal statute on the ground of violation of the Constitution of the United States, the District Court is required to convene a three-judge court under the provisions of either 28 U.S.C. § 2281 or § 2282, unless no substantial federal constitutional claim is presented or it is patently frivolous. *Bailey v. Patterson*, 369 U.S. 1 (1962); *Turner v. Memphis*, 369 U.S. 350 (1962); Ex Parte Poresky, 290 U.S. 30, 31 (1933); *Jones v. Branigin*, ___ F.2d ___ (Case No. 20,482, 6th Cir. 1970).

The claim would be deemed unsubstantial if, as the District Court held, the Supreme Court had passed upon the precise question involved in the present case.

The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen*.

In *Allen* the Supreme Court upheld a state statute which authorized the lending of secular text books to children irrespective of whether they attended public or private (parochial) schools. The Court applied the test stated in

Abington School Dist. v. Schempp, 374 U.S. 203 (1963):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 222.

Allen followed *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks.

Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. While the statute contains safeguards intended to insure the purchase of secular books and materials only, there is still a question whether this constitutes forbidden involvements of the state with religion. It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance.

The District Court did not have the benefit of the recent decision of the Supreme Court in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). The Court there held that state tax exemptions of properties used solely for religious purposes

did not violate the Establishment Clause as it was not aimed at establishing or supporting religion, but simply spared the exercise of religion from the burden of property taxation levied on private profit institutions. The Court was of the view that the exemption created only a minimal and remote involvement between church and state, an involvement much less than the taxation of the churches would entail. The test is essentially one of degree.

In discussing the important subject of involvement, Chief Justice Burger, who wrote the opinion for the court, stated:

> "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation." 397 U.S. at 675.

The decisions of the Supreme Court construing the Free Exercise and Establishment Clauses of the First Amendment have drawn fine distinctions and have laid down rules not easy to apply. They have been decisions by divided courts.

In our opinion, the additional step in the present case, namely, the loaning of library books and materials directly to the parochial schools, rather than the issuing of textbooks directly to the school children, together with the issue of whether the involvement required in applying the safeguards of the Act is minimal and remote, present sub-

stantial questions which were not resolved in Allen, and which require the convening of a three-judge District Court for determination.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.